

**LESLIE MURPHY,**

**Appellant,**

**v.**

**OLYMPIC AIR POLLUTION CONTROL**  
**AUTHORITY,**

**Respondent.**

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**PCHB No. 91-44**

**FINAL FINDINGS OF FACT**  
**CONCLUSIONS OF LAW**  
**AND ORDER**

A formal hearing was held Thursday, June 27, 1991, before the Pollution Control Hearings Board in Lacey, Washington, with Harold S. Zimmerman, Member Presiding, and Annette S. McGee, Board Member.

FINAL FINDINGS OF FACT,  
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1  
2 FINDINGS OF FACT

3 I

4 Leslie Murphy, appellant, lives at 3425 Stikes Drive SE, Lacey,  
5 Washington, where on January 4, 1991, at about 2:52 p.m. Air Inspector  
6 Robert Moody of the Olympic Air Pollution Control Authority observed  
7 smoke emanating from the chimney at the Murphy residence.

8 II

9 A burn ban had been declared at approximately 9:00 a.m.,  
10 January 4, 1991, by Control Officer Charles E. Peace of OAPCA.

11 III

12 The Pollution Control Hearings Board takes notice of Regulation  
13 I, OAPCA's rule dealing with outdoor burn bans. Chapt. 173-433-150,  
14 WAC. These rules have been in effect since 1987.

15 IV

16 Inspector Moody observed smoke coming from the chimney and took a  
17 photograph at 2:51 p.m. on a 35 mm Minolta, more than five hours after  
18 a burn ban was declared.

19 V

20 A notice of civil penalty assessment of \$175 was sent January 22,  
21 1991, by certified mail to Mr. Murphy as a second violation notice. A  
22 first violation had occurred on January 20, 1990, with a \$50 fine, \$25  
23 suspended, which was paid at that time.

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25  
26 FINAL FINDINGS OF FACT,  
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1  
2 VI

3 Both penalty assessments are within the guidelines set by OAPCA's  
4 Board of Directors in 1985.

5 VII

6 Mr. Murphy works evenings, and had returned home at 8:15 a.m. He  
7 recalls that it was a fairly clear sunny day, with no noticeable  
8 haze. He saw his wife off to work and went to bed. He did not call  
9 the OAPCA to inquire if there was a burn ban, and he does not recall  
10 whether his wife called. He did not have the radio on.

11 VIII

12 Mr. Murphy did not know there was an outdoor burning ban on  
13 January 3, 1991, nor did he understand there was any connection with  
14 the indoor ban.

15 IX

16 Because of lack of steady employment this past winter, the  
17 Murphys have used their wood stove to keep their electric power usage  
18 to a minimum. Heating with electric heat can run as high as \$400 a  
19 month in their home.

20 X

21 On January 4, 1991, Mrs. Murphy had loaded the stove and closed  
22 it down prior to leaving for work at approximately 8:30 a.m.  
23 Pollution updates were not available until approximately 9:15 a.m.  
24 after Mr. Murphy had gone to bed. When he arose at approximately  
25 2:30 p.m., the sun was out.

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XI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these matters. Chapters 70.94 (Clean Air Act) and 43.21B RCW.

II

The Clean Air Act enunciates the basic State policy applicable in this case:

*Limitations on burning wood for heat. Any person in a residence or commercial establishment which has an adequate source of heat without burning wood shall:*

*(1) Not burn wood in any solid fuel heating device whenever the department has determined under RCW 70.94.715 that any air pollution episode exists in that area;*

*(2) Not burn wood in any solid fuel heating device, except wood stoves which meet the standards set forth in RCW 70.94.457, in the geographical area and for the period of time that impaired air quality has been determined, by the department or any authority, for that area. [ . . . ] RCW 70.94.473.*

III

WAC 173-433-150 provides detailed regulations to enforce the Clean Air Act.

It states:

*WAC 173-433-150 Curtailment. (1) A person in a residence or commercial establishment with an adequate*

1 source of heat other than the burning of solid fuel  
2 shall not burn solid fuel in any solid fuel burning  
3 device:

4 (a) Whenever the department has declared an air  
5 pollution episode for the geographical area pursuant to  
6 chapter 173-435 WAC; or

7 (b) Whenever the department or an air authority has  
8 declared impaired air quality for the geographical  
9 area, except when the solid fuel burning device is  
10 certified under WAC 173-433-100.

11 (2) A person responsible for a solid fuel burning  
12 device already in operation at the time an episode is  
13 declared shall extinguish that device by withholding  
14 new solid fuel for the duration of the episode. A  
15 person responsible for a solid fuel burning device that  
16 is not certified under WAC 173-433-100 already in  
17 operation at the time impaired air quality is declared  
18 shall extinguish that device by withholding new solid  
19 fuel for the duration of the impaired air quality.  
20 Smoke visible from a chimney, flue or exhaust duct  
21 after a time period of three hours has elapsed from the  
22 time of declaration of the episode or impaired air  
23 quality shall constitute a prima facie evidence of  
24 unlawful operation of an applicable solid fuel burning  
25 device. This presumption may be refuted by  
26 demonstration that the smoke was not caused by an  
27 applicable solid fuel burning device.

#### 28 IV

29 We conclude that OAPCA has established a prima facie case that  
30 violation occurred.

#### 31 V

32 The appropriateness of the amount of a civil penalty is a matter  
33 involving consideration of factors bearing on reasonableness including:

34 (a) nature of the violation;

1 (b) prior behavior of the violator;

2 (c) actions taken after the violation to solve the problem;

3 Georgia Pacific v. DOE, PCHB No. 87-45 (1988).

4 VI

5 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
6 adopted as such.

7 From these Conclusions of Law, the Board enters the following

8 ORDER

9 Notice of Violation and civil penalty are AFFIRMED with \$50 of  
10 the \$175 penalty suspended, provided that there is no air pollution  
11 violation for a period of two years from the date of this Order.

12 DONE this 18<sup>th</sup> day of July, 1991.

13 POLLUTION CONTROL HEARINGS BOARD

14   
15 HAROLD S. ZIMMERMAN, Chairman

16   
17 ANNETTE S. M<sup>c</sup>GEE, Member

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